Filed 3/6/09 In re R.F. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re R.F., a Person Coming Under the Juvenile Court Law.	B203111 (Los Angeles County Super. Ct. No. VJ34671)
THE PEOPLE, Plaintiff and Respondent, v. R.F., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Phillip K. Mautino, Judge. Affirmed.

Law Office of Diane Goldman and Diane Goldman for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C. Brenan and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

R.F. appeals from an order of wardship pursuant to Welfare and Institutions Code[1] section 602 following a finding he committed three counts of assault with a deadly weapon. His only claim on appeal is that he received ineffective assistance of counsel. We affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

In early August 2007, 17-year-old appellant hosted a party at his parents' house while they were away on vacation. His 25-year-old sister, E.F., heard about the party and went to the house with two friends to see if everything was all right. There were young people in front of the house, and E.F. told them to leave. She walked inside and saw that the house was a mess. There were open containers of beer and hard alcohol. E.F. began pouring the alcohol down the drain in the kitchen.

Appellant walked into the kitchen and saw what his sister was doing. He told her to stop and grabbed her wrist. The two began to struggle. Appellant was about to hit his sister when her female friend, T.K., came into the room. According to appellant, T.K. grabbed him from behind. He tried to push her off, but she grabbed him by the neck and started choking him. He started to lose his breath, so he reached out and started choking T.K. E.F. screamed for R.C., T.K.'s boyfriend. R.C. pulled appellant off of T.K., held him against the wall, and told him to calm down. He let go of appellant, who ran out into the back yard.

As appellant's sister and her two friends approached the front door to leave the house, they encountered appellant coming in the front door. He was talking to his older brother on a cordless telephone, which he held in his left hand. He had a buck knife in his right hand. He held the knife around his midsection, with the blade pointing out. Appellant handed the phone to R.C., telling him it was his brother on the line. Appellant then said, "'Back the fuck up, leave my alcohol alone. I will stab anyone that tries to mess with me.'" R.C. dropped the phone, put up his hands and said, "'Okay. We're out

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[1] All statutory references are to this code unless otherwise indicated.

of here, but if you can move aside, we'll leave.'" Appellant moved aside, E.F. and her friends left the house, and appellant locked himself inside the house.

Appellant's sister asked a neighbor to call 911. Police arrived, and appellant was taken into custody. He was detained, and a wardship petition was filed pursuant to section 602. It alleged three counts of assault by means likely to produce great bodily injury, and three counts of assault with a deadly weapon. At the conclusion of the adjudication and disposition hearing, the People moved to dismiss two counts of assault by means likely to produce great bodily injury, which the court granted. The court found the third such count not true, but sustained all three counts of assault with a deadly weapon, and declared the sustained counts to be felonies. Appellant was placed home on probation. He filed this timely appeal.

DISCUSSION

Appellant claims he received ineffective assistance of counsel. He bases this claim in part on the fact that his attorney (his uncle) was not eligible to practice law in California at the time of his representation. That status resulted from counsel's failure to provide the State Bar of California with proof of compliance with the mandatory continuing legal education (MCLE) requirements.[2] In *People v. Ngo* (1996) 14 Cal.4th 30, 38, the Supreme Court held that "representation of a criminal defendant by an attorney who has been involuntarily enrolled on inactive status for MCLE noncompliance does not, in itself, amount to the denial of counsel." We turn to the other grounds for appellant's claim of ineffective assistance.

Appellant claims his attorney was so unfamiliar with juvenile court procedures and criminal law that he failed to raise effective arguments against appellant's continued detention pending trial, and failed to object to inadmissible evidence. There are two

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[2] We have granted appellant's motion to augment the record with the records from the State Bar of California relating to the status of trial counsel to practice law in California at the time he represented appellant. It thus is not necessary for appellant to raise this issue by petition for writ of habeas corpus.

components to a claim that counsel's assistance was so defective as to require reversal: (1) appellant must establish that counsel's representation fell below an objective standard of reasonableness; and (2) appellant must show prejudice resulting from counsel's alleged deficiencies. (*In re Marquez* (1992) 1 Cal.4th 584, 602-603; *Strickland* v. *Washington* (1984) 466 U.S. 668, 688, 693-694.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland* v. *Washington, supra*, 466 U.S. at p. 697.) To establish prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [¶] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id*. at pp. 693-694.) Appellant has not made this showing.

As to counsel's failure to obtain appellant's release prior to the hearing, we note that at the August 8, 2007 detention hearing, the prosecutor objected to appellant's release. He argued there were six felonies alleged involving three victims, and appellant had threatened use of a knife and caused injuries on the neck and arm of one victim.

Defense counsel argued strenuously against appellant's continued detention. He argued that the incident involved "five minutes of stupidity." He asserted that appellant had "never been in trouble, not even a traffic ticket, and now they want to detain him in jail." Counsel argued that appellant is young, he could be released to his grandparents until his parents returned from their vacation, and his father had informed counsel that the minor would face serious punishment for his conduct. The court also had before it the detention report, which recommended that appellant be released, noting that "Incident represents minor's first arrest and stem[m]ed from an episode of irrational behavior while under the influence of alcohol. Minor has no history of gang affiliation and he does not represent a threat to others. He is therefore recommended to be released home pending further court hearings."

Under section 635, in making a decision whether to release a minor from custody, the court is to "examine the minor, his or her parent, legal guardian, or other person having relevant knowledge, . . ." In addition, "[t]he circumstances and gravity of the alleged offense may be considered, in conjunction with other factors, to determine whether it is a matter of immediate and urgent necessity for the protection of the minor or reasonably necessary for the protection of the person or property of another that the minor be detained." (*Ibid*.)

In this case, after considering the recommendation in the detention report and hearing the arguments of counsel, the court found it would be contrary to appellant's welfare to remain in the home of his parent or guardian. Given that appellant's parents were still on vacation at the time of the hearing, that his release would have been to his 80-year-old grandparents, and that the incident involved uncharacteristically violent behavior by appellant including the threatened use of a knife against three victims, the court acted within its discretion in denying the requested release. Appellant has not shown what more counsel could or should have presented in order to obtain a different result at that time.

Appellant next claims counsel was ineffective in failing to bring a petition under *In re William M.* (1970) 3 Cal.3d 16 to seek appellant's release prior to the adjudication hearing. But he does not suggest what more would have been presented in that petition to convince the court that its initial detention order should be changed. He has not shown that counsel was deficient, or that he was prejudiced by the failure to file the petition.

Appellant next claims trial counsel was "missing in action" when appellant's sister tried to invoke her Fifth Amendment privilege not to testify. Before she testified, the prosecutor told the court she intended to invoke the privilege. He asked the court to decide whether the privilege applied at the outset of trial, indicating that if it did, he would seek approval to grant her use or transactional immunity.

E.F. testified and did invoke the Fifth Amendment. The court inquired about the basis of this claim. E.F. replied, "It is my word against my brother's word, since there are no other witnesses, and he could come back at me and say that I was over-stepping

my bounds and being hostile towards him, so I don't want to go into that."[3] She indicated she wanted to "protect the integrity" of her family, and that "[a]ll of us will be affected by the outcome of the sentence." She was afraid her testimony would hurt her communication and her bond with the family, and would separate her family. The court properly found the privilege against self-incrimination did not apply and ordered E.F. to testify.

There was nothing defense counsel could have said that would have changed this outcome. On appeal, appellant argues defense counsel could have argued that E.F. faced potential criminal liability for trespass or theft, based on her entry into her parents' house and her pouring alcohol down the drain. The potential for such prosecution is minute, and there is little doubt the prosecutor would have offered her immunity for these acts. Appellant has not shown deficient representation in this regard.

Next, appellant claims trial counsel was ineffective in failing to object to Deputy Salazar reading portions of her police report containing statements of the victims. The portions of the report which were read during trial involved statements made by E.F. and by appellant during the deputy's investigation. These statements were inconsistent with their testimony at trial, and thus were properly admitted under the hearsay exception for prior inconsistent statements. (See Evid. Code, § 1235.) The statements of the absent victims were not read by the deputy. E.F.'s statements about what she personally observed as to the other victims were not inadmissible hearsay.

Finally, appellant claims counsel was ineffective in cross-examination by failing to explore E.F.'s anger at her brother as a possible motive for her having the police called and for some of her statements to Deputy Salazar; failing to discredit E.F.'s statements about appellant's intoxication and his physical contact with the other victims as speculative or based on inadequate knowledge; failing to explore Deputy Salazar's lack of experience or expertise regarding intoxication and choke holds; and failing to explore whether Deputy Salazar embellished her report. Each of these issues was raised in some

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[3] The other two victims had moved to Alaska and were not available to testify.

form during cross-examination. The fact that the witnesses' answers did not provide a successful defense was not a deficiency in counsel's performance.

The court heard testimony by victim E.F. that when she and her friends were at the front door trying to leave the house, appellant held a buck knife toward them and told them to back up and "leave my alcohol alone. I will stab anyone that tries to mess with me." E.F. told Deputy Salazar at the time of the incident that appellant advanced toward her and her friends with the knife in a threatening manner. She told the deputy that she and her friends retreated because they feared for their safety.

Appellant testified that he felt threatened when he saw R.C.'s hand balled up into a fist and that was why he pulled out his knife. He told the three to back away from him, "Don't lay another hand on me. I will use it if I have to." He testified that the knife was down by his side. Deputy Salazar testified that when she gave appellant an opportunity to explain his side of the story, he showed her how he held the knife, with the knife pointed outward away from his body. He reported he had told the victims to "'Get away from me or I will strike.'" He also said he followed the victims out of the house.

The court resolved the conflicts in this properly admitted evidence, and concluded that appellant advanced on the three victims in a threatening manner with a knife. This was sufficient to sustain the allegations of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) Appellant has not shown that counsel's performance was deficient, nor has he shown a reasonable probability that in the absence of any of the claimed deficiencies in defense counsel's performance the court would have reached a different result.

DISPOSITION

The order of wardship is affirmed.

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EPSTEIN, P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.